BRIEF IN OPPOSITION
TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1151

CITY OF SANTA FE, a municipal corporation and BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, a political subdivision of the State of New Mexico,

Petitioners,

vs.

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

REASONS FOR DENYING THE WRIT

The Respondent hereby submits that a Writ of Certiorari to review the judgment of the New Mexico Supreme Court entered in this case should not be granted for the four reasons hereinafter stated and explained. The first three of these reasons are responsive to those expressed in the Petition for a Writ of Certiorari. The fourth is in the nature of "new matter."

1. While the New Mexico Supreme Court Has Decided a Federal Question, Its Decision Accords With the Decisions of the United States Supreme Court and of Other Federal Courts on the Basic Question.

Essentially, the question presented to and decided by the New Mexico Supreme Court in *Sangre de Cristo Development Corporation, Inc., v. City of Santa Fe, et al.*, ____ N.M. ____, 503 P.2d 323 (1972), was whether the Petitioners, as political subdivisions of a non-Public Law 280[1] state and pursuant to its laws, had the authority and power to control and regulate a non-Indian lessee's uses of and related activities on the lands of an Indian Pueblo.[2] In deciding that the Petitioners did not have the authority and power claimed by them, the New Mexico court observed (1) that Pueblo Indians are "Indian Tribes" and wards

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1. By Public Law 280, 67 Stat. 588, August 15, 1953 (18 U.S.C. Sec. 1162 and 28 U.S.C. Sec. 1360), Congress conferred comprehensive criminal and civil jurisdiction over Indians within Indian country upon California, Minnesota, Nebraska, Oregon and Wisconsin, and gave its consent to the assumption of such jurisdiction by other states if they appropriately amended their constitutions. New Mexico has not done so. See *Montoya v. Bolack*, 70 N.M. 196, 204, 372 P.2d 387 (1962) and *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 332, 361 P.2d 950 (1961). By Public Law 90-284, Title IV, 82 Stat. 78, Congress repealed the former provision permitting states to unilaterally assume jurisdiction over Indians and Indian country and enacted a virtually identical law permitting such assumption of jurisdiction by amendment of the state's constitution andt he consent of a majority of the enrolled adult members of the tribe affected. See 25 U.S.C. Secs. 1321-1326.
2. The Lease (App. A., *infra*), dated April 17, 1970, was made between the Pueblo of Tesuque (an Indian tribe recognized by the United States Department of Interior), as lessor, and the Respondent, as lessee, pursuant to 25 U.S.C. Sec. 415, which then provided, in material part, that:

> Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for . . . recreational residential, or business purposes, . . . All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on . . . the pueblo of Tesuque, . . . which may be for a term of not to exceed ninety-nine years, . . . (A)ll leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior . . .

of the United States government (503 P.2d 329), (2) that their lands are "Indian country" (*ibid.*), (3) that, accordingly, "the United States, through Congress, if it so elected, could exert total governmental control over Indian country" (*ibid.*), (4) that the New Mexico constitutional disclaimer clause[3] "does not preclude the applicability to the lands of valid state laws requiring platting and planning approval by" the Petitioners (*ibid.*) because the clause "is a disclaimer of proprietary interest therein and control thereover, and not a disclaimer of governmental control" (503 P.2d 330), (5) that the court was "unable to see how the exercise by defendants of this authority would interfere with the self-government of the Tesuque Pueblo" (503 P.2d 330-31), (6) but, that (503 P.2d 331):

> However, in our judgment, the exercise of this authority by defendants would conflict with the subdivision, planning and platting authority over these lands which the United States has preempted or reserved unto itself. . . .
>
> . . . . . .
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> . . . Under these circumstances[4] there is no room for the

3. In response to the New Mexico Enabling Act (Act of June 20, 1910, 36 Stat. 557) Article XXI of the state's constitution provides, in material part, that:

> Sec. 2. The people inhabiting this state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian Tribe shall have been extinguished, the same shall be and remain subject to the disposition and absolute jurisdiction and control of Congress of the United States; . . .
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> . . . . . .
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> Sec. 8. . . . (A)nd the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands owned or occupied by them on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state.

4. The "circumstances" expressly referred to by the New Mexico court were the language of 25 U.S.C Sec. 415, as amended by Public Law 91-275, 84 Stat. 303, June 2, 1970, relating to the leasing of Indian country land, and certain regulations of the Secretary of the Interior.

> State or its political subdivisions to impose additional or conflicting controls relating to the subdivision, planning or platting of the lands. *Warren Trading Post v. Tax Comm'n., supra.*[5] It is for Congress to decide when and to what extent the states and the political subdivisions thereof may exercise subdivision, planning and platting control over Indian lands leased pursuant to 25 U.S.C. Sec. 415, *supra,* and the regulations of the Secretary of the Interior promulgated under the authority granted him by Congress. See *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). (Footnotes added.)

Manifestly, the New Mexico Supreme Court has decided a federal question, and, in so doing, it has applied its interpretation of the case authorities decided by the United States Supreme Court (this Court).

As a first reason for granting certiorari, the Petitioners claim that the federal question has not heretofore been decided by this Court. This curious assertion assumes that a federal question decision of this Court regarding the authority and power of a state to enforce its laws within Indian country is strictly limited to the particular type of state law in question – that is to say, since the Court has not heretofore considered the precise issue of whether state subdivision, planning, platting or zoning laws can be enforced within Indian country as against a non-Indian lessee, the federal question involved has not been decided by this Court.[6] This assertion, we submit, ascribes an unintended and unnecessary narrowness to the expression "federal question" used in the Court's Rule 19(a).

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5. 380 U.S. 685 (1965).
6. This Court denied certiorari in *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22 (1967), cert. den. 389 U.S. 1016 (1967), where it was held by the Supreme Court of Washington, a Public Law 280 state (*supra,* Note 1), that a county could not ban a non-Indian's use of leased Indian lands as a garbage dump by the enforcement of its zoning ordinances.

Frankly, the Respondent is by no means satisfied with the rationale of the New Mexico court in the instant matter – that is to say, with its aforementioned observations as to the meaning and consequences of New Mexico's constitutional disclaimer clause and as to Petitioners' interference with internal Indian tribal sovereignty. But however that may be, the fact is that both the rationale and the decision of the New Mexico court in this matter are supported by federal question decisions of this Court as follows:

This Court has decided that the Indian Pueblos of New Mexico and their lands are "Indian tribes" and "Indian country," respectively, in the historical-legal sense of these expressions; that Congress had the power to so declare and did so. *United States v. Sandoval,* 231 U.S. 28 (1913); *United States v. Candelaria,* 271 U.S. 432 (1926); *United States v. Chavez,* 290 U.S. 357 (1933).

This Court has decided that the supreme authority and power reposes in Congress to control and regulate Indian tribes within Indian country, as well as commerce with such tribes, activities within and uses of such country, and to preempt any or all internal sovereign powers of such tribes and to delegate the same to federal officials or to the states. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama,* 118 U.S. 375 (1886). Further, it has been observed by this Court that, when Congress had wished the states to exercise criminal or civil jurisdiction within Indian country, it has expressly granted to the states the jurisdiction which *Worcester v. Georgia, supra,* denies to them. *Williams v. Lee,* 358 U.S. 217 (1959).

It has been held by this Court, that except as the same may have been limited, modified or preempted by Congress, an Indian tribe has sovereign power *within its Indian country* as to all matters affecting tribal government, affairs and property, including the authority and power to permit non-Indians to come upon and to transact business with the tribe respecting such property and the authority and power to control and regulate the use of such property and the conditions of such business by

Indians and non-Indians alike. *Worcester v. Georgia, supra; Morris v. Hitchcock,* 194 U.S. 384 (1904).[7]

It has been held by this Court that the laws of a state can have no force *within Indian country, Worcester v. Georgia, supra,* with the following exceptions: State criminal laws respecting crimes committed within Indian country by non-Indians not involving Indians or Indian property, *United States v. McBratney,* 104 U.S. 621 (1881), *Draper v. United States,* 164 U.S. 240 (1896), *New York ex rel Ray v. Martin,* 326 U.S. 496 (1946); state or territorial laws permitting the service of process upon non-Indians within Indian country in causes between non-Indians, *Langford v. Monteith,* 102 U.S. 145 (1880); territorial laws taxing the personal property of a non-Indian within Indian country, *Thomas v. Gay,* 169 U.S. 264 (1898).

Only in the instance where the assertion of state authority and power will not interfere with or infringe upon tribal sovereignty within Indian country has this Court indicated a willingness to permit such an assertion. *Williams v. Lee, supra.* But as indicated in this decision, an attempt by the state to control and regulate that which falls within the province of tribal sovereignty within its Indian country will not be tolerated. Moreover, as this Court has recently held, a tribal council cannot even bestow or confer an element of its tribal sovereignty within Indian country upon a state except in the manner expressly provided by Congress. *Kennerly v. Dist. Ct. of Ninth J.D. of Montana,* 400 U.S. 423 (1971). And even where the assertion of state regulatory or taxing authority and power does not necessarily interfere with or infringe upon tribal sovereignty within Indian country, this Court has held that the assertion will not be permitted where Congress has taken the matter in hand and has delegated a comprehensive power to control and regulate the activities in question to a federal official. *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965).

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7. See also *Buster v. Wright,* 135 F. 947 (8th Cir. 1905); *James H. Hamilton v. United States,* 42 Ct. Cl. 282 (1907); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

Mindful of the foregoing, the Petitioners chiefly rely here, as they did below, upon the comments and observations of this Court in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), to suggest that new and expanded parameters of permissible state control and regulation within Indian country are to be observed and applied. The decision is not the philosopher's stone the Petitioners require; it neither adds to nor subtracts from the foregoing principles. In *Kake*, the question was simply this: Can a Public Law 280 state[8] whose Enabling Act specifies that Indian lands and fishing rights "shall be and remain under the absolute jurisdiction and control of the United States . . . , except to such extent as the Congress has prescribed or may hereafter prescribe,"[9] prevent an Indian tribe, which has no "Indian country" but does have an off-reservation, aboriginal right to fish in certain state waters, from exercising such right by using fishtraps in violation of state law? The answer had to be "yes" under any doctrine. First, because off-reservation hunting and fishing rights have not been regarded as immune from state regulation during this century, *Ward v. Race Horse*, 163 U.S. 504 (1896); tribal sovereignty does not extend outside of Indian country. Second, because an aboriginal, as distinguished from a federally granted, right was not given immunity from Alaskan law under the congressional act conferring Indian criminal and civil jurisdiction on the state. Third, because no additional immunity was conferred or preserved by the "absolute jurisdiction and control of the United States" clause of the Alaska Enabling Act and Constitution since Congress had already otherwise "prescribed" by conferring criminal and civil jurisdiction over its Indians upon Alaska.

In view of the foregoing, it is respectfully submitted that this Court has heretofore decided the broad federal questions involved in the proceeding before the New Mexico court and that, if the latter court misinterpreted this Court's decisions (as we think it did in several instances), it erred in favor of the Petitioners.

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8. Public Law 85-615, 72 Stat. 545, August 8, 1958. See also Note 1, *supra*.
9. Alaska Enabling Act, Sec. 4, 72 Stat. 339, July 7, 1958.

2. The New Mexico Court Did Not Decide the Federal Question in a Manner Inconsistent With the Applicable Decisions of the United States Supreme Court.

As their second ground for granting the writ, the Petitioners complain that the New Mexico court erroneously applied the federal preemption doctrine explained by this Court in *Warren Trading Post Co. v. Arizona State Tax Commission, supra.* Specifically, they claim that the federal statutes and regulations cited and discussed by the New Mexico court are not sufficiently comprehensive to invoke the doctrine. The Petitioners' contention must fail for three reasons: First, because the decision of the New Mexico court, as distinguished from the assigned rationale, is supported by more fundamental doctrines announced by this Court, as demonstrated under the preceding point. Second, because the New Mexico court cited and discussed in its decision less than all federal acts giving rise to the preemption. Third, because a subsequent judicial decision demonstrates beyond question that Congress has taken the business of Indian land development by non-Indian lessees so fully in hand that little room remains for the non-Indian developer and that none remains for state or local subdivision, planning, platting, or zoning control. It is unnecessary to repeat what was earlier said in support of the first of these reasons.

As to the second reason, the New Mexico court was informed by the Respondent's brief, as this Court itself observed in *United States v. Candelaria, supra,* that Congress has enacted many laws respecting the disposition of Indian tribal lands. By its Act of June 30, 1834,[10] Congress declared that:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[11]

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10. 4 Stat. 729, 730, c. 161, Sec. 12; 25 U.S.C. Sec. 177.

11. In 1871, Congress abolished the practice of making treaties with Indian tribes. 16 Stat. 544, 566, c. 120, March 3, 1871; 25 U.S.C. Sec. 71.

The Act of February 27, 1851[12] extended the provisions of the 1834 Act to the "Indian tribes" of New Mexico, and the Enabling Act for the state[13] specified that its constitution should declare, as it does,[14] that:

> Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribe shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; . . .

By the Pueblo Land Act of June 7, 1924,[15] Congress specified that:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the state of New Mexico, or in any other manner excepting as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the state of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

And by its Act of June 18, 1934,[16] Congress added to the restrictions imposed by the 1924 Pueblo Lands Act upon the alienation of Pueblo lands by banning all transfers except in exchange for lands of equal value.

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12. 9 Stat. 574, 587, c. 14, Sec. 7.
13. 36 Stat. 557, 558-60, c. 310, Sec. 2, June 20, 1910.
14. New Mexico Constitution, Art. XXI, Sec. 2.
15. 43 Stat. 636, 641-42, c. 331, Sec. 17, June 7, 1924.
16. 48 Stat. 984, 985, c. 576, Sec. 4, June 18, 1934; 25 U.S.C. Sec. 464.

Leases of the lands in question, "with the approval of the Secretary of the Interior, for . . . recreational, residential, or business purposes . . . for a term not to exceed twenty-five years" and "under such *terms* and regulations as may be prescribed by the Secretary of the Interior" were first authorized by the Act of August 9, 1955.[17] The term was extended to 99 years as to the Pueblo of Tesuque by the Act of October 12, 1968.[18]

Turning to the lease in question and to the "*terms*" inserted therein by the Pueblo of Tesuque and the Secretary of the Interior, it may be observed that the Respondent is required to construct and provide a golf course, roads, and all necessary utilities to serve the proposed residential community,[19] to submit a complete master plan and architect's designs of the development for the approval of the Pueblo and the Secretary,[20] to submit all plans for improvements and construction on the land to architect and engineering review boards, the membership of which is to be approved by the Secretary, for prior review and approval,[21] and to comply with all applicable air and water pollution control and prevention laws, regulations and federal agency recommendations.[22] Finally, it should also be noted that Respondent's obligations under the lease are owed to both the Pueblo and the United States.[23]

The foregoing, we submit, constitutes a sufficiently comprehensive scheme of federal regulation as to leave no room for state or local subdivision, planning, platting, or zoning regulation under the doctrines announced by this Court in *Warren Trading Post Co. v. Arizona State Tax Commission, supra.* Moreover, it is also noted that in *Metlakatla Indian Community, Annette Islands Reserve v. Egan,* 369 U.S. 45 (1962), this Court held

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17. Public Law 255, 69 Stat. 539, c. 615, Sec. 1, August 9, 1965; 25 U.S.C. Sec. 415.
18. Public Law 90-570, 82 Stat. 1003, October 12, 1968; 25 U.S.C. Sec. 415.
19. Lease, Art. 7; App. A, p. 6a, *infra.*
20. *Id.*, Art. 8; App. A, p. 6a-7a, *infra.*
21. *Id.*, Art. 9; App. A, p. 9a, *infra.*
22. *Id.*, Art. 37; App. A, p. 9a-10a, *infra.*
23. *Id.*, Art. 28, App. A, p. 9a, *infra.*

that Alaska, upon which Congress had bestowed complete criminal and civil jurisdiction over Indians and their lands,[24] could not enforce its anti-fishtrap conservation laws within a reservation that Congress had declared was "to be held and used by (the Indians) in common, under such rules and regulations and subject to such restrictions as may be prescribed from time to time by the Secretary of the Interior,"[25] if the Secretary decided, by appropriate regulation, to permit the Indians to use fishtraps.

The decision, subsequent to that of the New Mexico court, which indicates that no room remains for state or local subdivision, planning, platting, or zoning control or regulation of the Respondent's activities on the Tesuque Pueblo lands is that of the Court of Appeals for the Tenth Circuit in *Davis v. Morton,* 469 F.2d 593 (10th Cir., Nov. 24, 1972), a decision which may live to rival the massacre at Wounded Knee in the annals of Indian defeats at the hands of their white neighbors. Referring to the lease here in question and to the exercise of the approval power by the Secretary of the Interior, the court held in *Davis* that he was constrained to first embrace the environmental universe by complying with the provisions of the National Environmental Policy Act.[26] Accordingly, since his May 24, 1970 approval of the lease was held to be ineffective, he will also be obliged to comply with the June 2, 1970 amendment to 25 U.S.C. Sec. 415(a)[27] which further specifies that:

> Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial

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24. Public Law 85-615, 72 Stat. 545, August 8,1958; see also Note 1, *supra.*
25. 26 Stat. 1095, 1101, c. 561, Sec. 15, 1891; 48 U.S.C. Sec. 358.
26. 42 U.S.C. Sec. 4321, *et seq.*
27. Public Law 91-275, 84 Stat. 303, June 2, 1970; 25 U.S.C. Sec. 415(a).

forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

3. The Decision of the New Mexico Supreme Court Does Not Conflict With That of the Ninth Circuit and the Decisions of the Arizona Court of Appeals Are Not in Point.

The Petitioners' claim that the decision of the New Mexico court conflicts with that in *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir., 1971), cert. den., 405 U.S. 933 (1972). The dispute in *Agua Caliente* arose in California, a Public Law 280 state, unlike New Mexico.[28] Moreover, by its Act of October 5, 1949,[29] Congress had earlier provided that:

> . . . (A)ll lands located in the Agua Caliente Indian reservation in the state of California, and the Indian residents thereof, shall be subject to the laws, civil and criminal, of the state of California, but nothing contained in this section shall be construed to authorize the alienation, encumbrance, or taxation of the lands of the reservation . . .

The court simply held in *Agua Caliente* that California's possessory interest tax could be imposed under these circumstances upon a non-Indian lessee's interest in *alloted* trust lands of these Indians, but not upon the Indians' interest therein, which seems entirely correct in light of the clear negative implications of the above-quoted statute and in light of the fact that Congress had preempted virtually all internal tribal sovereignty within Indian country and bestowed it upon the state. Moreover, the decision scarcely conflicts with that of the New Mexico court in the instant matter; it is not even in point.

No more in point are the state income tax cases, cited by the Petitioners, in *McClanahan v. State Tax Comm'n.*, 14 Ariz. App.

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28. *Supra*, Note 1.
29. Public Law 322, 63 Stat. 705, c. 604, October 5, 1949.

452, 484 P.2d 221 (1971), and *Kahn v. State Tax Comm'n.*, 16 Ariz. App. 17, 490 P.2d 846 (1972), which are now pending on appeal before this Court. They do appear to conflict, however, with the February 9, 1973, as yet unreported decision of the New Mexico Court of Appeals in *Hunt v. O'Chesky.*[30] Moreover, we note that Arizona did not fare too well in *Williams v. Lee, supra,* and in *Warren Trading Post Co. v. Arizona State Tax Commission, supra,* and we trust that its new attempts to extend its jurisdiction, absent compliance with the requirements of 25 U.S.C. Sec. 1324, *et seq.*,[31] will fare no better.[32]

4. The Pending Case of "*David L. Norvell, Attorney General, State of New Mexico v. Sangre de Cristo Development Company, Inc. and Rogers C. B. Morton, et al.*," D.C.N.M., No. 9106 – Civil, Will Provide a Better Decision for this Court to Review on Appeal or Certiorari.

In the last cited case, the New Mexico Attorney General is seeking a judgment against the Respondent, the Secretary of the Interior, and others, declaring that the New Mexico Land Subdivision Act,[33] the state's Construction Industries Licensing Act,[34] the state's Water Quality Act,[35] the state's laws respecting the regulation of plumbing, drainage, water supplies, sewage and water disposal, lighting, heating, ventilation and sanitation systems in public buildings,[36] the state's ad valorem property tax laws,[37] the state's alcoholic beverage laws,[38] and all regulations promulgated on the authority thereof, are applicable to

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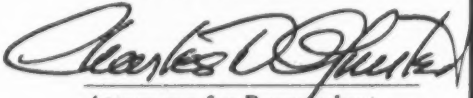
30. Reported in Vol. II, No. 42, New Mexico State Bar Bulletin at 557.
31. Public Law 90-284, Title IV, Secs. 404 and 406, 82 Stat. 78, April 11, 1968; 25 U.S.C. Secs. 1324 and 1326; see Note 1, *supra.*
32. See *Warren Trading Post Co. v. Arizona State Tax Comm'n., supra.* (380 U.S. 691, footnote 18 to opinion.
33. Secs. 70-3-1, *et seq.*, N.M.S.A., 1953.
34. Secs. 67-35-1,*et seq.*, N.M.S.A., 1953.
35. Secs. 75-39-1, *et seq.*, N.M.S.A., 1953.
36. Sec. 12-1-4(8), N.M.S.A., 1953.
37. Secs. 72-1-1, *et seq.*, N.M.S.A., 1953.
38. Secs. 46-6-1, *et seq.*, N.M.S.A., 1953.

the uses of these leased lands, use and business activities thereon, and interests therein and in improvements thereon, by and of Respondent and its sublessees. Some Indian tribes and pueblos have been permitted to intervene and others have been permitted to act as *amicus curiae*. Moreover, the Petitioner County has intervened and the Petitioner City has or will file a brief as *amicus*. The judgment of the District Court will inevitably be reviewed by this Court, however the case is decided. Obviously, it presents a much more comprehensive and fruitful opportunity for review than does the decision of the New Mexico court in the instant matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

OLMSTED & COHEN



Attorneys for Respondent
Sangre de Cristo Development
Company, Inc.

APPENDIX A

LESSEE: SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.

LESSOR: THE PUEBLO OF TESUQUE

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* * * * * * *

LEASE

THIS LEASE, made and entered into this 17th day of April, 1970, by and between THE PUEBLO OF TESUQUE, an Indian Tribe recognized by the United States Department of the Interior and having accepted provisions of the Indian Reorganization Act of June 18, 1934 (18 Stat. 984, *et seq.*) hereinafter called the Lessor, whose address is Tesuque, New Mexico, and SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico corporation, hereinafter called the Lessee, whose principal office is at 342 East Manhattan Avenue, Santa Fe, New Mexico, under the provisions of the Act of August 9, 1955 (69 Stat. 539), as amended by the Act of October 12, 1968 (82 Stat. 1003; 25 U.S.C. 415-415d).

1. DEFINITIONS:

A. "Secretary" means the Secretary of the Interior or his authorized representative, delegate or successor.

B. For the purpose of computing rent due to the Lessor, "Lessee" means, unless otherwise provided herein, the Lessee, sublessees, assignees, transferees, concessionaires, permittees, or any successor in interest of any of them, provided, however, that no duplication is intended.

2. PURPOSE:

A. The premises leased and to be leased hereunder shall be developed, used and operated pursuant to a general plan of development attached hereto as Exhibit "A".

B. Lessee shall not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

3. LAND DESCRIPTION AND OPTIONS:

For and in consideration of the rent, covenants, terms, conditions and agreements contained in this lease, the Lessor does hereby lease unto the Lessee that certain tract of land located within the Pueblo of Tesuque Grant, Santa Fe County, New Mexico, designated as TRACT 1 on the plat attached hereto as Exhibit "B", excepting therefrom the following:

A plot of land lying in Sec. 10, T. 18 N., R. 9 E., N.M.P.M., within the Tesuque Pueblo Grant, more particularly described as follows: Beginning at an iron highway right of way marker, marked Sta. 4+50, said marker being on the east right of way line of Hwy. No. 85; thence N. 29° 33′ W. 411.80 ft. along said right of way line to point 1; thence N. 60° 27′ E. 156.50 ft. to point 2; thence N. 34° 55′ W. 217.00 ft. to point 3; thence S. 55° 37′ W. 136.50 ft. to point 4; thence S. 29° 33′ E. 205.00 ft. to point 1, containing 0.70 acre, more or less.

The land now under lease as set forth and described in Exhibit "C" attached hereto is not included nor made a part of this lease.

Provided, however, after the present contractual rights of the Lessees, as shown on Exhibit C, terminate, all of the lands covered by said leases shall become a part of the respective tract (No. 1 or 2) within which they are located, provided the Lessee shall pay to the Lessor an amount equal to the Lessor's present annual rental now being received on such lands or the amounts set forth in this lease on the increments to which these lands become a part, whichever amount is greater.

Except as otherwise specifically provided in this lease, the Lessee shall have, subject to all the covenants, terms, conditions, and agreements contained in this lease, the exclusive right to exercise successive options to include in this lease those further tracts of land located within the Pueblo of Tesuque Grant, Santa Fe County, New Mexico, designated as TRACTS 2 through 5, inclusive, on the said Exhibit "B", except land now under lease as set forth and described in Exhibit "C" attached hereto.

TRACTS 1 through 5, inclusive, are located within the following described lands:

Sections 1, 2, 3, 10, 11, 12, 13, 14, 23 and 24, Township 18 North, Range 9 East, N.M.P.M.;

Sections 33, 34, 35 and 36, Township 19 North, Range 9 East, N.M.P.M.,

and more particularly described in Exhibit "B".

Said TRACTS 1 through 5 are subject to valid existing rights; subject also to the lessor's right hereby reserved, to cross said premises for access to adjoining lands provided such is not inconsistent with the Lessee's use of the leased premises.

It is understood and agreed that the Lessee shall have the right to enter upon all of the foregoing sections of land to survey and plat the exact legal description designated for each numbered tract. The legal description of each numbered tract, and survey platted, shall substantially conform to the plat as shown on Exhibit "B". The filing of a surveyed plat for each tract substantially conforming to Exhibit "B", shall cause this lease to be amended to describe such tract as set forth in the surveyed plat.

It is further understood and agreed that the Lessee may exercise only one such option at a time, in ascending numeral order of numbered tracts. The option to include in this lease Tract 2 must be exercised not later than the earliest of either the start of the eighth lease year hereunder or the end of five years after the Lessee gives notice of waiver to terminate lease, provided for in paragraph 4. Thereafter, each successive option must be exercised not later than five (5) years from and after the exercise of the next preceding option. Failure to exercise any option within the specified time period shall terminate the right to exercise that option and the option to any succeeding tracts.

The total acreage included within Tracts 1 through 5, inclusive, shall not exceed 5,400 acres, more or less.

The option to include in this lease Tracts 2 through 5 shall be exercised by giving written notice thereof to the Lessor and the Secretary; provided, however, that in order for any option to be effective, the Lessee shall have progressed substantially in the development and subleasing of the previously leased tract(s); and shall be current in all rental payments then due and shall not otherwise be in any material and adverse violation of any covenant, term, condition, or agreement of this lease.

4. TERMS

This lease shall be for a term of 99 years, beginning on the date of approval by the Secretary.

Notwithstanding any other provision of this lease, the Lessee may, within two (2) years from the beginning date of this lease, on thirty (30) days' written notice, terminate this lease; such termination to be without penalty, provided, however, that no portion of Tract 1 may be subleased until such time as Lessee waives its right to terminate this lease.

In the event Lessee elects to terminate this lease under provisions of this paragraph, all improvements made on the leasehold shall become the property of Lessor without encumbrance and free and clear of all claims against the same, and the Lessee, on such termination, shall, in addition, make available to Lessor all plans, designs, studies and reports then in possession of Lessee relating to the development of any of the leased premises.

(Articles 5 and 6 omitted)

7. IMPROVEMENTS ON TRACT 1:

Within two (2) years from the beginning date of the term of this lease, Lessee, its successors or assigns, shall begin and diligently pursue construction of a nine (9) hole golf course and roads and utilities to serve the residential community as shown on the Master Plan.

8. PLANS AND DESIGNS:

A. Within six (6) months after the beginning date of the term of this lease, the Lessee shall submit for the approval of the Lessor and the Secretary a Master Plan and architect's design for the complete development of Tract 1. Within six (6) months after the Lessee exercises its option to lease any of the additional tracts provided for in paragraph 3 above, the Lessee shall submit for the approval of the Lessor and the Secretary, a

Master Plan and architect's design for the complete development of such tract. Each master plan and architect's design, upon approval, shall be deemed to take the place of the general plan of development with respect to the land covered thereby. The Secretary and Lessor shall approve or state their reason for disapproval of the Master Plans and architect's designs within sixty (60) days after receipt thereof from Lessee.

All subdivision plats shall substantially conform to the general plan of development referred to in paragraph 2 above.

B. In the event the Lessor, Lessee and the Secretary cannot agree on the master plan and architect's design within a reasonable time after submission thereof by the Lessee, either party may submit to arbitration as provided in paragraph 22, the question whether the proposed master plan and/or the question whether the architect's design are reasonable for the development of the land. The parties shall consider the recommendation of the Board of Arbitration in the approval of the master plan and a reasonable time shall be allowed for such consideration.

C. Before commencing the construction of any improvements at a cost of more than $5,000.00 on the lease premises, the Lessee shall submit to the Lessor and the Secretary comprehensive plans and specifications for the improvements then proposed. The Lessor and the Secretary shall approve such plans and specifications if they conform to the approved master plan and architect's design, but the Lessor and the Secretary shall not thereby assume any responsibility for construction or any violation of any applicable laws, ordinances, or governmental regulations. The Lessor and Secretary shall either approve or disapprove said plans and specifications within sixty (60) days after receipt thereof; provided, that, in any event, approval shall not be unreasonably delayed. If either the Secretary or Lessor shall fail to disapprove within said sixty (60) days period, then such plans and specifications shall, on the expiration of sixty (60) days, be deemed approved by the Secretary or the Lessor, as the case may be. No material changes will be made in plans or specifications after approval without the consent of the Lessor and the

Secretary. In the case of residential improvements, if the plans and specifications for any single family unit or multi-family building are approved in the manner set forth above, such plans and specifications shall be deemed to have been approved where they are applied without change to any other such unit or building on the leased premises.

D. It is understood and agreed by the parties that the Lessee will create or cause to be created a new municipality or municipalities or like political subdivisions or cause to be created property owner's associations or like entities for residents of the leased premises. Such municipalities, political subdivisions or associations must, of necessity, provide any and all municipal services normally and usually provided by municipal corporations. These services shall include, but shall not necessarily be limited to water service, streets, utilities, schools, parks, police and fire protection, and any and all other normal and usual municipal services. As between Lessor and Lessee, it shall be the responsibility of the Lessee to furnish or cause to be furnished all such municipal services, it being understood that neither the Lessor nor the Secretary shall be in any way responsible for or obligated to furnish municipal services to the residents of the leased premises. The Lessee shall submit to the Lessor and Secretary for approval as part of the master plan and architect's designs required by this paragraph, a complete and detailed plan for such municipal services, which plan, upon being approved by the Lessor and the Secretary, shall become an integral part of this lease.

E. Without diminishing the obligation of the Lessee to make improvements as here stated, it is agreed that Lessee may lend money to, or advance money for, an Improvement and/or Maintenance Fund or other similar fund or entity to be used for making such improvements for municipal services which Lessee is obligated to make or which it may deem desirable; the Lessee shall have the right to repayment of any such loan or advance in accordance with the terms of the agreement evidencing the loan or advance; but the Lessor shall never be under obligation to make any such repayment.

9. CONSTRUCTION, MAINTENANCE, REPAIRS AND ALTERATIONS:

Lessee shall appoint an Architect's Review Board and Engineering Review Board; each such Board shall be composed of three (3) members of the particular profession. The members of each Board shall be approved by the Secretary. The Secretary shall not unreasonably withhold his approval of the members appointed by Lessee.

The construction of all improvements by the Lessee shall be in accordance with the plans and specifications provided for in paragraph 8. Construction shall be located in accordance with the master plan and architect's design provided for in paragraph 8. All plans for improvements and construction on the leased premises shall be reviewed and approved by the appropriate Review Board.

The Lessee and the sublessees shall be responsible for the maintenance, repair and upkeep of all buildings and other improvements constructed on the leased premises. The Lessee and its sublessees may make such alterations, additions and improvements as are consistent with provisions of paragraph 8.

(Articles 10 through 27 omitted)

28. OBLIGATIONS OF LESSEE:

While the leased premises are in trust or restricted status, all of the Lessee's obligations under this lease, and the obligations of its sureties, are to the United States as well as to the Lessor.

(Articles 29 through 36 omitted)

37. AIR AND WATER POLLUTION CONTROL:

The Lessee agrees to comply with all applicable air and water pollution control and prevention laws, regulations and Federal

air pollution and water pollution control agencies' recommendations, in the construction, operation and maintenance of all sewage systems, sewage treatment or disposal plants or systems, and all other facilities located on the leased premises.

(Articles 38 through 42 omitted)

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

PUEBLO OF TESUQUE
By
s/ Joe M. Romero
Governor

ATTEST
s/ Geranimo Vigil

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.
By s/ Santiago E. Campos
SANTIAGO E. CAMPOS, President

ATTEST
s/ Norman R. Rosen
NORMAN R. ROSEN, Secretary

Approved as to form
s/ T. Ortega
Field Soliciter

APPROVED: May 24, 1970
s/ Walter O. Olson
Area Director, Albuquerque Area Office (BIA)

Approved pursuant to delegation of approval authority from Commissioner of Indian Affairs by teletype dated May 20, 1970

STATE OF NEW MEXICO)
COUNTY OF SANTA FE) ss.

The foregoing instrument was acknowledged before me this 17th day of April, 1970, by Joe M. Romero, Governor of the Pueblo of Tesuque, an Indian Tribe, on behalf of said Tribe.

s/ Gloria D. Lerma
Notary Public

My Commission Expires: 6-20-72

STATE OF NEW MEXICO)
COUNTY OF SANTA FE)

The foregoing instrument was acknowledged before me this 17th day of April, 1970, by Santiago E. Campos, President of Sangre de Cristo Development Company, Inc., a New Mexico corporation, on behalf of said corporation.

s/ Gloria D. Lerma
Notary Public

My Commission Expires: 6-20-72